IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and ALONZO ROBINSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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I.

OPINIONS OF COURTS BELOW

The September 2, 1975 oral opinion and order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.) in Criminal Number 74-133 dismissing petitioners' motions to dismiss on double jeopardy grounds is attached hereto. Appendix p. 44. The Judgment Order of the United States Court

of Appeals for the Third Circuit under Numbers 75-2071, 2072 and 2073 affirming the order of the District Court is attached hereto. Appendix p. 50. The Court of Appeals' denial of Petition For Rehearing is attached hereto. Appendix p. 52. An earlier opinion of the Court of Appeals reversing judgment of conviction after direct appeal is reported *sub nom. United States v. Starks, et al.*, 515 F.2d 112 (3d Cir. 1975).

II.

STATEMENT OF JURISDICTION

The judgment order of the Court of Appeals affirming the District Court was entered on February 10, 1976. A timely Petition for Rehearing was denied on March 5, 1976. On March 16, 1976, the Court of Appeals stayed the issuance of the mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, to April 4, 1976 pending the filing of the present Petition For Writ of Certiorari which was granted by this Court on June 14, 1976.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under the doctrine of *United States v. DiSilvio*, 520 F.2d 247 (3d Cir. 1975).

III.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE HOBBS ACT, 18 U.S.C.A. §1951

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

FEDERAL RULE OF CRIMINAL PROCEDURE RULE 12(b)(2)

Objections that the indictment "... fails to show jurisdiction in the court or to charge an offense ... shall be noticed by the court at any time during the pendency of the proceedings."

IV.

QUESTIONS PRESENTED FOR REVIEW

1. Whether retrial of petitioners is barred by the double jeopardy clause of the Fifth Amendment where a general verdict of guilty on a duplicitous indictment fails to disclose whether the jury found each defendant guilty of one crime or both?

2. Whether the indictment fails to charge an offense?

V.

STATEMENT OF THE CASE

On March 14, 1974, petitioners herein were first charged in a duplicitous one count indictment (Appendix p. 5) with conspiracy and attempt to violate the Hobbs Act, 18 U.S.C. §1951; they were found guilty in a general verdict, and took a direct appeal. Judgment of conviction was reversed and the case remanded to the district court. *United States v. Starks et al.*, 515 F.2d 112 (3d Cir. 1975). In its opinion, the Court of Appeals found that the indictment was duplicitous. 515 F.2d at 116.

The Court of Appeals ordered the government to make an election prior to a retrial as to which of the two crimes charged in the single count indictment it would proceed on. During a pre-trial conference on August 22, 1975, the government expressed its intention to proceed on the conspiracy offense.

In the District Court petitioners filed a Motion To Dismiss on the basis that a second trial on this indictment, even following the government's election,

will subject them to double jeopardy in violation of their rights under the Fifth Amendment to the United States Constitution. In their motions, petitioners also argued that even after an election to proceed on the conspiracy allegation, the indictment is fatally defective for failure to sufficiently charge a crime under the laws of the United States.

On September 2, 1975, the District Court denied petitioners' motion;[1] this order was in turn affirmed by

[1] After this case was remanded by the Third Circuit for a new trial, petitioners filed in the district court a Motion to Dismiss the Indictment alleging a violation of double jeopardy stemming from its duplicity and another Motion to Dismiss based upon the failure of the indictment to charge a crime under the laws of the United States. Although the district court stated: "I would certainly give very serious consideration to the possible claim of double jeopardy," (Transcript of September 2, 1975 at p. 8, Appendix p. 44), the judge felt that in view of the remand by the Circuit for a new trial, he could not simply dismiss the indictment.

Accordingly, the district court specifically stayed the trial and permitted petitioners to appeal, (D.C. Docket Entries, No. 167), under the doctrine of *United States v. DiSilvio*, 520 F.2d 247, 248, n.2(a) (3d Cir. 1975), holding that the denial of a motion to dismiss the indictment on a double jeopardy grounds is a final and appealable order under 28 U.S.C. Section 1291, see *Cohen v. Beneficial Industrial Loan Corporation*, 377 U.S. 541 (1949); *United States v. Lansdown*, 460 F.2d 164 (4th Cir. 1972). The government did not object to the stay nor the appeal. The Judge asked the prosecutor for his position and he stated he had none and further said: "I think the court is correct. According to the DiSilvio case the matter is appealable. If there is anything anyone of us would have to say at this time it would be in a brief to the Court of Appeals." (TR, Hearing 9-2-75, p. 8, Appendix p. 49). In the absence of the stay, a trial would have begun forthwith.

Thereafter, the appeal was filed and petitioners raised therein not only the double jeopardy issue but also the claim that the

(continued)

the Court of Appeals. Review is sought herein of this affirmance by the Court of Appeals. All proceedings concerning the retrial of petitioners in the District Court have been stayed pending the filing and disposition of this Petition for Certiorari.

V.

ARGUMENT

A. Retrial of Petitioners Is Barred by the Double Jeopardy Clause of the Fifth Amendment Where a General Verdict of Guilty On A Duplicitous Indictment Fails to Disclose Whether the Jury Found Each Defendant Guilty of One Crime or Both.

The Court of Appeals found the "singularly inartistic indictment" in this case to be duplicitous as it charges

(footnote continued from preceding page)

indictment was insufficient to charge a Federal offense. This procedure was utilized because the Third Circuit held in *United States v. Beard*, 414 F.2d 1014 (3d Cir. 1969) and *United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956) that a challenge to the sufficiency of an indictment for failure to allege an offense may be raised for the first time on appeal. See also F. R. Crim. P. Rule 12(b)(2), which provides that the failure of an indictment ot charge an offense shall be noticed by the court at any time during the pendency of the proceedings.

For the first time on appeal the government took the position that the denial of the motion to dismiss on double jeopardy grounds was not appealable prior to trial and that the Court of Appeals had no jurisdiction to consider the claim that the indictment fails to charge an offense. The government's request that the Third Circuit overrule *Desilvio* was implicitly rejected by the Court of Appeals.

two offenses – conspiracy and attempt – in one count. *United States v. Starks, et al., supra.* at 115, 116.

Counsel for petitioners repeatedly requested, both early in the proceedings and during the course of the trial that the government make an election. Transcript (hereinafter TR.), 6-14-74 Conference in Chambers, pp. 37-39, Appendix p. 7; TR., Trial, pp. 8-146, 147, Appendix p. 9; TR., Trial, pp. 10-54, 55, Appendix p. 36. Nevertheless the government steadfastly refused to do so, choosing instead to proceed through trial and on appeal on the incorrect theory that a valid judgment of conviction could be imposed on the duplicitous indictment. *Starks, supra.* at 117 fn. 9.

The Court of Appeals reversed the conviction on other grounds and remanded for a new trial, choosing not to dwell on the impact of the duplicitous indictment on petitioners' constitutional rights.

Nevertheless, petitioners contend the Court of Appeals' order for a new trial with a requirement that the government make an election, fails to vitiate the harm inherent in being tried not only once, but also potentially a second time under the instant indictment.

Proceedings under this duplicitous indictment subject petitioners to double jeopardy in two ways: First, by its nature a duplicitous indictment violates the double jeopardy clause of the Fifth Amendment to the United States Constitution and accordingly given the government's overreaching in refusing to make an election prior to the first trial, the indictment should have been dismissed. Secondly, since the petitioners have stood trial once on a duplicitous indictment, a second trial – even after an election by the government – will impermissibly once again expose petitioners to jeopardy for charges of which arguably they were acquitted during the first trial.

Most importantly, the overall effect of the government's action in drafting this duplicitous indictment and forcing petitioners to stand trial on it has created an environment for the case in which any further attempt by the government to try these petitioners on this indictment is barred by the Fifth Amendment.

1. A Duplicitous Indictment by its Nature Violates the Double Jeopardy Clause.

This Court has on numerous occasions set forth the reasons for the requirement that an indictment must be clear and concise. One of the most important among these is: "... 'in case any other proceedings are taken against [the defendant] for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen v. United States*, 161 U.S. 29, 34." *Hagner v. United States*, 285 U.S. 427, 431 (1932) cited at *Russell v. United States*, 369 U.S. 749, 763, 764 (1962).

Furthermore, "the prohibition against duplicity is designed to protect a defendant's rights under the sixth amendment ... and to guard against the possibility that 'confusion as to the basis of the verdict may subject the defendant to double jeopardy in the event of a subsequent prosecution' (citation omitted)." *United States v. Tanner*, 471 F.2d 128, 139 (7th Cir. 1972).

A duplicitous indictment fails to meet the due process requirements of Rule 7(c) F.R. Crim. P. that it be clear and concise, and violates by its nature the Fifth Amendment prohibition against double jeopardy. *United States v. Heinze*, 361 F. Supp. 46, 56 (D.C. Del. 1973).

2. Retrial is Not Permitted Where Defendants Have Been Subjected to Double Jeopardy by Prosecutorial Overreaching.

Where prosecutorial overreaching causes reversal of a conviction or the termination of a trial after defendants have revealed their defense, a retrial is barred by the double jeopardy clause. *Downum v. United States*, 372 U.S. 734 (1963).

The rationale for this rule is that retrial under such circumstances permits an ill-prepared or incompetent prosecutor the opportunity to retrench and prepare new evidence for pleadings after having learned the defense. The same rationale applies to the instant case and permits petitioners to raise the Fifth Amendment double jeopardy claim at this point despite their having won a reversal of their first conviction on appeal.

The first trial proceeded for the duration of ten days at great expense for both the government and petitioners despite defense counsels' repeated request that the government make an election on the indictment which both defense and the trial court clearly understood was duplicitous. *Starks, supra.* at 116, 117. The government's refusal to elect must be seen as overreaching of the sort which bars retrial.

3. The Trial Court's Charge Failed to Correct the Constitutional Infirmity of the Duplicitous Indictment.

The dangers of permitting trials on duplicitous indictments are nowhere better illustrated than in the instant case. Following a ten day trial all three petitioners were "convicted" of two separate offenses joined in a single duplicitous indictment.

However, beside the fact of their "conviction," there is no way for each petitioner to know of what offense he individually was convicted or conversely of what offense he may have been acquitted.

While the trial court conscientiously sought to charge the jury so as to eliminate the problems associated with a duplicitous indictment, it was a virtual impossibility. Petitioners are now faced with retrial after "a general verdict of guilty [which] does not disclose whether the jury found [them] guilty of one crime or both." *Starks, supra.* at 116. (The charge of the trial court is set forth in full in the Appendix at page 11.)

The District Court Charged the jury as follows:

> "Therefore, I shall define to you all of the requisites of both conspiracy and an attempt, because all of these requisites must be found before the jury could find any defendant guilty." TR, Trial p. 10-26. (Appendix p. 26).

The District Court then went on to define conspiracy, carefully explaining that a conspiracy could include one or more of the petitioners. TR., Trial page 10-27 (Appendix p. 27).

Thereafter the District Court briefly charged the jury on the elements of attempt. TR., Trial page 10-35 (Appendix p. 32). The Court suggested that any or all of the petitioners could be found guilty of attempt, TR., Trial page 10-38 (Appendix p. 34), and that an attempt by one or more could constitute the overt act of conspiracy. TR., Trial page 10-35 (Appendix p. 32).

In objecting to the charge, Mr. Carroll, counsel for petitioner Robinson, suggested to the Court that it had not clearly charged the jury that before any petitioner could be found guilty the jury must find:

"... number 1, was there a conspiracy, number 2, was this defendant a member of the conspiracy, and, number 3, did he commit an act constituting attempt." Tr. page 10-54 (Appendix p. 36)

The Court responded, *inter alia*:

"If they are members of the conspiracy and one of them committed an attempt, then as I see it under this indictment, they could all be found guilty." Tr. page 10-55. (Appendix p. 37). See *Pinkerton v. United States*, 328 U.S. 640 (1946)

This colloquy demonstrates the confusing nature of this duplicitous indictment. While the Court initially charged that a petitioner must be found guilty of both conspiracy *and* attempt to be found guilty, the remainder of the charge and the express understanding of the Court was to the contrary.

Since two of the original five defendants were acquitted, the jury obviously understood that it could find some defendants guilty of less than all of the crimes charged. The key question, one which is not susceptable to an answer in the absence of pure speculation, is whether or not the jury found some of the remaining petitioners guilty of less than all the crimes charged.

Given the confusing nature of the indictment and charge, the permutations of the possible bases for the verdict are numerous. In light of the trial court's understanding, each petitioner might have been found guilty of the conspiracy without being found guilty of attempt. Moreover, any of the three petitioners might have been excluded from the conspiracy, but found guilty of attempt. The existence of this question creates a distinct possibility that retrial, even on conspiracy alone, will subject them to double jeopardy. As the court below recognized:

"... a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both...." 515 F.2d 112 at 116.

Thus, petitioners are faced with "having to 'run the gantlet' a second time," *Ashe v. Swenson*, 397 U.S. 436, 446 (1970), without the benefit of a clear verdict on the first trial.

If the indictment had been properly drafted with two counts and the jury had found petitioners guilty of one of the two counts, petitioners could not be retried on the other count, even following a successful appeal of the count on which they were found guilty. This would be true even if the jury were silent as to the remaining count. *Green v. United States*, 355 U.S. 184 (1957).

In light of the general verdict of guilty in the first trial, the Fifth Amendment double jeopardy clause should protect petitioners from having to stand trial again for an offense their guilt of which can be ascertained only by sheer speculation.

4. The Sound Administration of Justice Bars Retrial in This Case.

The instant case presents an exception to the rule of *United States v. Ball*, 163 U.S. 662 (1896) that retrial is permitted after defendant's successful appeal. This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969) characterized as "unmitigated fiction: in certain circumstances the premise that a retrial after a reversal on appeal is permitted because "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U.S. 711, 721. In the instant case, because of this prosecutorial overreaching, that

premise is wholly inapposite and must likewise be viewed as "unmitigated fiction."

This Court recognized that principles supporting the "sound administration of justice" should be given greater weight than "conceptual abstractions" in deciding whether or not after a reversal a second trial should be barred by the double jeopardy clause of the Fifth Amendment. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

In the instant case the prosecutor insisted on carrying the trial through to its conclusion despite the obvious duplicitous nature of the indictment. To permit retrial now will encourage prosecutors to insist on such flawed trials in the future knowing that reversal will simply provide a second opportunity to require defendants to twice "run the gantlet" at great cost to the public. Accordingly, the sound administration of justice requires that a second trial now be barred.

B. The Indictment Fails to Charge A Federal Offense.

1. The Hobbs Act Does Not Proscribe a Conspiracy to Commit Attempted Extortion.

It is axiomatic that every essential element of an offense must be charged. *United States v. Debrow*, 346 U.S. 374, 376 (1953). Concomitantly, an indictment cannot charge as an offense something which was not created by an Act of the legislature. There is no federal common law and there are no federal criminal offenses except those specifically created or enacted by the Congress of the United States, 16 Am. Jur. 2d,

Conspiracy, Section 2; *State v. Wheeling Bridge Co.*, 13 How. 518, 563 (U.S. 1851); *United States v. Hudson*, 7 Cranch 32, 34 (U.S. 1812).

In the instant case, even considering the fact that the government has elected to proceed on "conspiracy," the indictment still fails to charge a violation of 18 U.S.C. Section 1951. The "singularly inartistic" indictment, with the attempt charge disregarded, charges that petitioners did:

> "conspire... to obstruct... commerce... by extortion... by... *attempting* to obtain... money (from the victim)..., the *attempted* obtaining of said (money)...being... intended to be accomplished with the consent of (the victim) induced and obtained by the wrongful use...of actual and threatened force, violence and fear...". (Memorandum of United States at 5)

Accordingly, the indictment now charges petitioners with *"conspiring"* to obstruct commerce by *attempted* extortion, as opposed to the completed act of extortion itself, which is defined in subsection (b)(2), a permissible object of the conspiracy offense referred to in Section 1951.

The Hobbs Act, *supra*, provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in this section shall be fined... or imprisoned, or both...
>
> (b)(2) The term "extortion" means the obtaining of property from another, with his consent, induced by the wrongful use of actual or

threatened force, violence or fear, or under color of official right.

Although this act is not a model of clarity, petitioners agree with Judge Gibbons' analysis of what the Hobbs Act in part prohibits:

> "The Hobbs Act proscribes a number of separate offenses: (1) robbery; (2) extortion; (3) attempted robbery or extortion; and (4) conspiracy to commit robbery and extortion. Each such offense also requires the Federal jurisdictional element of obstruction, delay, or effect on interstate commerce. . ." *Starks, supra*, at 116. (Footnote Omitted).[2]

A fair reading of the text of Section 1951 is that the words "so to do" appearing after the antecedent "conspires" apply also to the phrase "attempts." In other words, in recognizing that "conspiracy" and "attempt" are two spearate and distinct offenses, Congress intended to proscribe an *attempt* to rob or extort in addition to and as compared to a *conspiracy* to rob and extort.[3] The phrase extortion is defined in

[2] Incredibly enough, the inartfully drafted indictment here seems to charge the conspiracy was to obstruct the federal jurisdictional element rather than being a conspiracy to commit extortion which affected interstate commerce.

[3] "Conspiracy" and "attempt" have long been denominated as distinct inchoate offenses to distinguish them from the substantive offense that is the object of the activity encompassed by inchoate crimes. *E.g., Final Report of The Commission on Reform of Federal Criminal Laws*, 74 (1971). (The Commission states that "the various forms of *inchoacy* dealt with in this Chapter are not to be cumulated. . .") *Model Penal Code*, Tentative Draft No. 10 (1962) (dealing with the complementary inchoate crimes of conspiracy, attempt and solicitation). Moreover, in view of the use of the word "attempt" in Section 1951 and in the absence of a general Federal "attempt" statute, the phrases "attempting" and "attempted" in the indictment should not be equated with the same words commonly used in everyday conversation.

subsection (b)(2) without any reference to the inchoate offense of "attempt".

The legislative history of Section 1951 not only supports petitioners' position that attempted extortion was not intended to be the subject of a Hobbs Act conspiracy charge, but also clarifies the surface ambiguities in the text. The present version of Section 1951 was codified as part of the 1948 revision of Title 18, United States Code. Prior to 1948 revision, the Hobbs Act, including amendments added in 1946, read in pertinent part as follows, see *Callanan v. United States*, 364 U.S. 587, 588, n.1 (1961):

> "Sec.2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or *extortion*, shall be guilty of a felony.
>
> Sec.3. Whoever *conspires* with another or with others, or acts in concert with another or with others to do anything in violation of Section 2 shall be guilty of a felony.
>
> Sec.4. Whoever *attempts or participates in an attempt* to do anything in violation of Section 2 shall be guilty of a felony."
> (emphasis added)

Under this language it is clear that since Section (3) three refers back only to Section (2) two, Congress did not intend that *attempted* extortion could be the object of the conspiracy charge in Section (3) three. The "attempt" and "conspiracy" offenses are obviously treated separately. When the present or 1948 version of the Hobbs Act was enacted, the words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 Act. There was no intention to change the common understanding of these two offenses

previously created in the Hobbs Act. No mention is made in the legislative history that now "attempted" extortion could be an object of the conspiracy charge. The conspiracy section was designed to prohibit a conspiracy to commit any of the designated *substantive* violations. See *Callanan, supra* at 590, 591, notes 4 and 5.

Had Congress intended that "attempted" extortion could be the object of "conspiracy," it would have done so with language having far more clarity.[4] For example, Section 503 of the Model Penal Code, defining "Criminal Conspiracy," does so with the following exactitude:

> (1) Definition of Conspiracy. A person is guilty of *conspiracy* with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in

[4] The only case holding that "attempted" extortion could be the object of conspiracy is *United States v. Jacobs*, 451 F.2d 530, 534 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), where the court said in *dicta*:

> "it will be observed that Section 1951, *supra*, defines three offenses where robbery is not involved, namely, extortion, attempted extortion, and conspiracy to commit extortion or attempted extortion, which obstruct, delay, or affect interstate commerce." (Footnote omitted) 451 F.2d at 534.

This interpretation of the Hobbs Act was made without analysis of the legislative history or the language of the text. In *Starks, supra*, at page 116, Judge Gibbons' discussion of what the Hobbs Act proscribes noticeably omits conspiracy to commit *attempted* extortion.

> conduct which constitutes such crime or an *attempt* or solicitation to commit such a crime; or
>
> (b) agrees to aid such other person or persons in planning or commission of such crime or of an *attempt* or solicitation to commit such crime." (Emphasis added)

Under the circumstances here, the ambiguity apparent on the face of the Hobbs Act should be resolved in favor of lenity and any doubts resolved in favor of petitioners. *United States v. Bass*, 404 U.S. 336, 347, 348 (1971).

2. The Indictment Fails to Allege the Essence of Conspiracy: An Agreement to Commit an Offense.

The indictment also fails to charge an offense because it falls short of the minimum required standards for charging any conspiracy.

The special nature of the conspiracy offense in which defendants are not being tried for the relatively objective behavior of committing a crime, but rather for the relatively illusory behavior of planning a crime, requires that an indictment be drawn to specific guidelines. *United States v. Britton*, 108 U.S. 199 (1883); *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915). In conspiracy indictments, the risk to an accused of prejudice is too great to permit the "common sense" interpretation of vague and inspecific language which the government urges in the instant case.

However, even if this court were to adopt the government's attempt to read the indictment in a

"common sense" fashion, it would still be legally insufficient to charge a crime. In its brief in the Third Circuit Court of Appeals, the government's "Common sense" construction of the indictment reads:

> "[The defendants did] conspire... to obstruct... commerce... by extortion... by... attempting to obtain... money...", etc. (Brief of the United States p. 22).

Nowhere does there appear the foremost essential element of a conspiracy indictment: "an agreement".[5]

The essence of conspiracy lies in the agreement. "That agreement must be distinctly and directly alleged. Inference and implication will not, on demurrer, suffice. Aid cannot be sought in the allegations of what was done in pursuance of it...What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven." *Hamner v. United States*, 134 F.2d 592, 595 (5th Cir. 1943).

[5]See *United States v. Mathies*, 203 F. Supp. 797 (W.D. Pa. 1962) where the court reviewed cases dealing with the sufficiency of conspiracy indictments and concluded, "Those decisions also stated that there are three essentials in a conspiracy indictment: the agreement, the offense – object toward which the agreement is directed, and an overt act." 203 F. Supp. at 801.

VII.

CONCLUSION

Petitioners respectfully request that your Honorable Court reverse the Judgment Order of the Court of Appeals for the Third Circuit and remand the case with instructions to dismiss the indictment.

Respectfully submitted,

/s/ Ralph David Samuel
RALPH DAVID SAMUEL

/s/ Thomas C. Carroll
THOMAS C. CARROLL

/s/ Joel Harvey Slomsky
JOEL HARVEY SLOMSKY